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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

YOLANDA ESPINOSA,

Defendant and Appellant.

H030264

(Monterey County

Super. Ct. No. SS050806)

Defendant Yolanda Espinosa appeals from a judgment of conviction entered after she pleaded no contest to forgery (Pen. Code, § 470, subd. (d)), receiving stolen property (Pen. Code, § 496, subd. (a)), and possession of methamphetamine for sale (Health & Saf. Code, § 11378). The trial court placed defendant on probation for three years. We conclude that the trial court properly denied defendant's motion to suppress evidence. However, we reverse the judgment and remand the matter for further proceedings to determine defendant's ability to pay attorney's fees.

I. Statement of Facts

On February 7, 2005, Deputy Brian Pickens and United States Postal Inspector Kathy Winn went to a property in Watsonville, because they had received information that individuals were making counterfeit checks at that location. There was a single driveway for three houses at that location. Pickens and Winn knocked on the door of one

of the houses, but no one responded. They then looked through a window and saw a computer, printer, typewriter, a check-making program box, and a large box containing opened mail. They also saw a can of acetone. Some of the neighbors approached Pickens and Winn. They stated that people were arriving at the house “day and night,” and using a ladder to enter through a kitchen window. One of the neighbors also stated that he had seen “gang member types inside smoking drugs.”

At approximately 1:45 p.m., Andres Galvan drove into the driveway. Defendant was in the front passenger seat. Pickens approached Galvan’s vehicle and said something similar to “Hey, guys, what are you up to?” Galvan responded that he was looking for a friend named Jose that lived at the end of the driveway. Pickens told him that he had spoken to the neighbor who lived at that location, and nobody by that name lived there. Pickens asked Galvan for identification, which he provided. He also asked defendant her name, and she identified herself as Erica Rodriguez. When he asked defendant for her date of birth, she initially just stared at him. She eventually looked away from him and stated it very slowly. When he asked her how old she was, she stuttered and responded “in kind of a question form.” While looking down at the floorboard where her purse was located, defendant stated that she had no identification.

Pickens asked defendant and Galvan if he could check them for warrants. They said that was okay. When Pickens asked if they had any warrants, Galvan said no, and defendant slowly shook her head back and forth, but did not answer. In response to Pickens’s question as to whether they were on probation, Galvan stated that he did not think he was on probation, and defendant denied that she was on probation. Pickens asked Galvan to step out of the car, and he did. At Pickens’s request, Galvan followed him to his patrol car. Pickens then asked Galvan if he would consent to a search of his person. Galvan shook his head up and down, and put his hands up in the air. When Pickens asked Galvan about defendant’s name, Galvan repeated the name that defendant

had previously given. Pickens asked Galvan whether he knew anything about making fraudulent checks. Galvan stated that he did not.

Pickens asked Galvan if he could search his vehicle for illegal checks, check-making equipment, and stolen mail. Galvan informed him that he had a laptop computer in his car, but he was not making any checks on it. Galvan then gave his consent to a search of the vehicle. Pickens also learned that Galvan was on felony probation with a search condition.

Pickens returned to Galvan's car, told defendant that she had lied about her name, and asked if she had any identification in her purse. Defendant said no as she attempted to conceal her purse. Pickens saw a blue Bank of America bag and a piece of paper protruding from her purse. Pickens asked her to hand him the paper, and told her that he was going to search the car and find out who she was anyway, because Galvan had consented to a search and he was on probation with a search condition. Pickens was "certain" that if he searched the vehicle, he would find something with defendant's name on it. Initially, defendant hesitated, and then she slowly took the paper out, and eventually gave it to him. The paper was a receipt from Anbar Self-Storage with defendant's name on it. At that point she admitted her true name and date of birth. Pickens believed that he had probable cause to arrest her for providing false information to an officer. When Pickens asked her to exit the car, she did. He asked her if she had anything illegal on her person, and she shook her head. When he asked her to empty her pockets, she complied and produced a prescription bottle containing plastic baggies of methamphetamine and eight other kinds of prescription medications. The amount of drugs indicated possession for sale. When Pickens asked defendant to empty her pockets, he had obtained the results from the warrant check that defendant had three warrants and a search condition. During the search, Pickens found defendant's identification in her purse and a checkbook, credit cards and a health card with the name Amanda Oberg in a Jack in the Box bag on defendant's lap.

Pickens went to Anbar Storage the following day. An employee identified defendant as renting a storage locker. The employee also produced the check tendered for the rental. Defendant signed the check with the name Amanda Oberg.

II. Discussion

A. Motion to Suppress Evidence

Defendant first contends that the trial court erred in denying her motion to suppress evidence. She argues that the seizure of the paper from her purse, drugs from her person, and documents from the Jack in the Box bag violated her Fourth Amendment rights.

In reviewing a ruling on a motion to suppress evidence that was first brought at the preliminary hearing, as was done in the present case, we defer to the magistrate's factual findings where they are supported by substantial evidence. (*People v. Snead* (1991) 1 Cal.App.4th 380, 384.) "In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

Not all encounters between police officers and individuals implicate the Fourth Amendment's prohibition of "unreasonable searches and seizures." (*Florida v. Royer* (1983) 460 U.S. 491, 499.) An officer does not implicate Fourth Amendment concerns "by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen." (*Id.*, at p. 497.) An officer may talk to anyone he encounters while regularly performing his duties. (*People v. Castanada* (1995) 35 Cal.App.4th 1222, 1227.) A consensual encounter is not transformed into a detention when an officer asks for identification or asks questions expressing suspicion about an individual's conduct. (*People v. Terrell* (1999) 69 Cal.App.4th 1246, 1254; *People v. Lopez* (1989) 212 Cal.App.3d 289, 293.)

Here, Pickens's initial contact with Galvan and defendant was consensual. He asked them to identify themselves. When defendant responded, she acted in an evasive manner. Pickens also asked them if he could check them for warrants. Both Galvan and defendant answered that he could. Galvan also consented to a search of his person and his vehicle. Moreover, Pickens learned that Galvan was on probation with a search condition. Defendant does not assert that she was improperly detained. Instead, she claims that her consent to the seizure of the paper in her purse was not voluntary.

A defendant can consent to a search, "but the consent must be unequivocal, specific, and freely and intelligently given. [Citation.]" (*People v. Bailey* (1985) 176 Cal.App.3d 402, 404.) "[I]f the consent is given because of an unlawful assertion of authority, it is not voluntary and is unlawful. [Citations.]" (*Id.* at p. 405.) Consent cannot be "induced by compulsion, intimidation or oppressive circumstances." (*People v. Lawler* (1973) 9 Cal.3d 156, 164.) It is the People's burden to prove that a defendant's consent to a search is voluntary. (*Bumper v. North Carolina* (1968) 391 U.S. 543, 548.) The voluntariness of consent is a question of fact, which is determined from the totality of the circumstances. (*Schneckloth v. Bustamante* (1973) 412 U.S. 218, 227.) The trial court's determination of the voluntariness of a defendant's consent is reviewed for substantial evidence. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1092-1093.)

Here there was substantial evidence to support the finding of consent. Based on defendant's hesitation in supplying her name, date of birth, and age, Pickens returned to the vehicle to tell her that she had lied about her identity. When he asked if she had any identification in her purse, she said no as she pushed her purse under the seat. Pickens saw a paper protruding from the purse and asked to see it. He told her that he was going to search the vehicle, because Galvan had consented to a search and he was on probation with a search condition. Defendant hesitated, and then handed him the paper. Thus, as the magistrate observed, she "decided that she . . . had the choice of giving it up or not

giving it up.” Based on the totality of the circumstances, we conclude that defendant voluntarily consented to give the paper to Pickens.

Relying on *Bumper v. North Carolina*, *supra*, 391 U.S. 543, defendant argues that Pickens’s statement that he was going to search the vehicle indicated that it would have been futile for her to resist, and thus her consent was involuntary. *Bumper* is distinguishable from the present case. In that case, the officer announced that he had a search warrant, and the occupant consented to the search. (*Id.* at p. 546.) At the hearing on the motion to suppress evidence, the prosecutor relied on the occupant’s consent to search, not the warrant. (*Ibid.*) The court held that “[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search.” (*Id.* at p. 550.) Here, Pickens’s search of the vehicle would have been lawful based on Galvan’s consent and his search condition. Moreover, Pickens stated that he would search the vehicle, not defendant’s purse.

Defendant also contends that the discovery of the methamphetamine on her person and the items in the Jack in the Box bag violated her Fourth Amendment rights.

When Pickens asked defendant to empty her pockets, she produced the prescription bottle containing methamphetamine. At this time, Pickens had received the results of the warrant check indicating that defendant was on probation with a search condition. This condition justified any search of her person as well as the Jack in the Box bag. (*People v. Bravo* (1987) 43 Cal.3d 600, 607.)

Since defendant voluntarily handed the paper to Pickens, and her probationary search condition justified the search of her person and the Jack in the Box bag, the trial court properly denied the motion to suppress evidence.

B. Attorney’s Fees Order

Defendant next argues that the trial court erred in ordering her to contact the public defender’s office for a determination of her ability to pay attorney’s fees.

Penal Code section 987.8 provides, in relevant part, that “the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost” of legal assistance provided by “the public defender or private counsel appointed by the court.” (Pen. Code, § 987.8, subd. (b).) The determination that a defendant has the ability to pay is a prerequisite for entry of an order that defendant pay all or part of the cost. (Pen. Code, § 987.8, subd. (e).) Only the trial court may make this determination. (See Pen. Code, § 987.8, subd. (b).) However, “[t]he court may, in its discretion, order the defendant to appear before a county officer designated by the court *to make an inquiry* into the ability of the defendant to pay all or a portion of the legal assistance provided.” (*Ibid*, italics added.)

Here the trial court ordered defendant to “[c]ontact the Public Defender’s Finance Division within 20 days and provide them with the necessary information. They’ll tell you how much you can afford to pay toward those services, and you’re ordered to pay that amount.” The trial court also signed an order, which was issued the same day. It stated: “If the Defendant fails to appear within 20 days as previously stated, the Public Defender’s office will determine that the Defendant is able to pay for the full cost of the Court-Appointed Counsel.” No mention was made of the finance division reporting back to the trial court prior to imposition of an attorney’s fees order. The finance division’s role, if any, is only to inquire into the defendant’s ability to pay attorney’s fees. Thus, the trial court erred in failing to make the determination regarding defendant’s ability to pay attorney’s fees.¹

The People argue that defendant failed to object to this procedure, and thus has forfeited the issue on appeal. We disagree. As this court stated in *People v. Viray* (2005) 134 Cal.App.4th 1186, 1215, “we do not believe that an appellate forfeiture can properly

¹ Since we remand the matter for further proceedings, we need not consider defendant’s argument relating to notice.

be predicated on the failure of a trial attorney to challenge an order concerning his own fees.”

III. Disposition

The judgment is reversed. The case is remanded to the trial court with direction to institute proceedings in accordance with Penal Code section 987.8 to determine defendant’s ability to pay her attorney’s fees.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Duffy, J.